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SOME PHASES OF THE NEW YORK CIVIL PRACTICE ACT AND RULES

The New York Civil Practice Act which is to become effective on April 15th, 1921 [1], is concededly a compromise between the views of those who advocated a total abolition of the Code of Civil Procedure and a substitution therefor of a short Practice Act supplemented by rules to be exclusively under the control of the judiciary [2], and the views of others, by no means few in number, who feel that a few amendments to the existing Code of Civil Procedure would serve the purpose [3]. Nevertheless, the new Practice Act cannot in any true sense be regarded as a mere "re-shuffling of the cards" or a mere re-arrangement and re-allocation of the provisions now contained in the Code of Civil Procedure. The reforms both in matters of substance and by way of simplification and clarification are much more sweeping and important than a casual examination of the Act would lead one to believe; and the suggestion made by some critics, that it accomplishes so little in the way of real reform as to make unnecessary the total re-arrangement and re-numbering of the sections, and the transfer of many of the Code provisions to the various chapters of the Consolidated Laws [4], appears to be wholly unfounded.

[1] Civil Practice Act, § 1540, hereafter referred to as C. P. A.

[2] Report of Board of Statutory Consolidation, dated April 1, 1915, submitted with a proposed Civil Practice Act and Rules, now commonly known as the Rodenbeck Code. Hon. Adolph J. Rodenbeck as chairman of the Board, vigorously supported the short practice act and rules by many articles in leading law periodicals and by addresses before lawyers and Bar Associations. Some of said articles are: *The New Practice in New York* (1916), 1 Cornell Law Quar. 63; *Principles of Modern Procedure* (1917) 2 Bull. Am. Judicature Soc. 100; *Power of Supreme Court to Regulate its own Procedure* (1918) 12 Bench & Bar 453.

[3] While these views are not usually given full publicity, the expressions of opinion by individual members of the bar given privately and at Bar Association meetings, would indicate a very widespread feeling that unless some very radical or revolutionary changes are made in procedural matters, it would be better to leave the Code of Civil Procedure intact and accomplish the most desirable changes by simple amendments.

[4] Many provisions now contained in the Code of Civil Procedure have been transferred to the Real Property Law (Laws 1920, c. 930), the Decedent Estate Law (Laws 1920, c. 919), the Condemnation Law (Laws 1920, c. 923), and the

It is the purpose of this article to discuss in particular two of the most important reforms which have been accomplished, namely: the inclusion of a provision and supplementary rules with respect to declaratory judgments [5] and the salutary changes bearing upon the subject of the joinder of parties. Among the other changes which may be in a way regarded as substantial or fundamental, are: the extension of the power to join causes of action in a complaint or counterclaim [6]; the simplification of the method of taking testimony by examination before trial, which under the new Act is made possible almost as a matter of course in every case [7]; the practical abolition of the distinction between judge's and court orders [8]; the extension of the right to an order for substituted service of the summons against residents to all cases where it is shown that the plaintiff has been or will be unable with due diligence to make personal service within the State [9]; and the abolition of demurrers, motions with reference to pleadings having been substituted in their place [10]. Changes less fundamental have been made with reference to Appellate Practice [11], extensions of time [12], State writs [13], filing and service of papers [14], service of summons by publication upon infants and incompetents [15], Code tender [16], and other matters of incidental practice.

Some reforms, and perhaps those of special interest to the profession are to be found in the court rules adopted on September 21st, 1920, by the convention assembled for that purpose under legislative authority. Among these are the application for summary judgment made by motion upon affidavits where an answer has been served in an action to recover certain debts or liquidated demands, [17] and the provision that in "an action brought upon a promissory note, or other evidence of debt for the unconditional payment of money," no order extending the time to plead shall be granted, except upon two days' notice to the plaintiff's attorney. [18] The provision formerly applicable to corporations [19] is thus very properly extended to actions of this description against all defendants, whether corporate or otherwise. The time within which motions

General Associations Law (Laws 1920, c. 915). Separate acts have also been created known as the Surrogate Court Act, Court of Claims Act, New York City Court Act and Justice Court Act.

[5] C. P. A. §473, Rules 210-15.
[6] C. P. A. §258.
[7] C. P. A. §§288-96, Rules 120-33.
[8] C. P. A. §§128-9.
[9] C. P. A. §230.
[10] C. P. A. §260, 277, Rules 106, 108, 109, 111.
[11] C. P. A. §620.
[12] C. P. A. §98.
[13] C. P. A. §§1283, 1293-4, 1313, 1320, 1341.
[14] C .P. A. §§100, 163-4.
[15] C. P. A. §232.
[16] C. P. A. §§173-4.
[17] Rule 113.
[18] Rule 86.
[19] Code of Civil Procedure §1778.

with reference to pleadings may be made is restricted to twenty days from the service of the pleading,[20] thus extending the old rule which was applicable only to motions to make a pleading more definite and certain or to strike out irrelevant, redundant or scandalous matter.[21] It is perhaps significant that none of the above rules, with the exception of the one with reference to motions with respect to pleadings, which appeared in modified form, were included in the proposed set of rules suggested by the joint committee of the legislature at the time of the submission of the proposed Civil Practice Act.[22]

Declaratory Judgment

Probably the most far-reaching and important change in procedure brought about by the Civil Practice Act is included in the following section:

"§473. Declaratory judgments. The supreme court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. Such provisions shall be made by rules as may be necessary and proper to carry into effect the provisions of this section."

The rules supplementing the above section make the practice and forms of an ordinary civil action applicable, require an exact specification in the complaint of the precise rights or relations of which a declaration is requested and provide for the taking of a special verdict when necessary, and costs and appeals.[23] There is also the following very important rule:

"Rule 212. Jurisdiction discretionary. If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised."

The door is thus opened to an entirely new field of procedural remedy in this State and one which may in time, as it has already done in England, occupy more than half of the time of the courts[24] where such actions are triable.

The inclusion of these provisions has been the subject of considerable controversy, and it is a rather curious fact that the Civil Practice Act

[20] Rule 105.
[21] General Rule of Practice XXII.
[22] Report of Joint Legislative Committee on the Simplification of Civil Practice (Albany, 1919).
[23] Rules 210-11, 213-5.
[24] "Of the official reports of cases in the Chancery Division in 1884, 34 per cent were declaratory actions; in 1916, based upon the cases reported in 2 Chancery Divisions this percentage had risen to 67 per cent and in 1917 it reached 66 per cent." Borchard, *The Declaratory Judgment—a Needed Procedural Reform* (1918) 28 Yale Law Journal 1 8

as introduced in the legislature on February 23, 1920,[25] which was passed almost without change, did not contain any provision with reference to declaratory judgments.

As the historical development of the declaratory judgment and restrictions and rules applicable thereto in the various jurisdictions where this remedy is available, have been exhaustively and admirably discussed by Professor Edwin M. Borchard and by Professor Edson R. Sunderland in their articles on the subject,[26] reference will here be made only to a few considerations which are likely to affect the interpretation to be placed by the New York courts upon the above provisions of the Civil Practice Act and Rules.

At the outset, it should be born in mind that the declaratory judgment in no sense resembles the submission of a controversy on an agreed statement of facts, which has been possible in New York and most other states for a great many years. The provisions of Sections 1279-81 of the Code of Civil Procedure, which found their source in the Code of Procedure, have been limited in their application to those cases, and those cases only, where the person named as plaintiff in the submission could bring an action at law or in equity against the person named therein as defendant.[27]

The purpose of the declaratory judgment, on the other hand, is of course to adjudicate and decide rights and relations between parties where no coercive relief, such as the issuance of an execution to collect money or an injunction or direction, is requested, and where the court is merely requested to declare what are the rights or relations of the parties. It is true that such declaration may be, and frequently is, made in connection with judgments or decrees which are essentially coercive, but the broad power to make such declarations generally has not heretofore existed in New York, either alone or as incidental to other relief.

The most frequent examples of declaratory judgments as made in England,[28] Scotland, Germany, Canada, Australia, India, and in New Jersey,[29] Connecticut,[30] Wisconsin and Florida,[31] where similar statutes

[25] Senate Bill No. 923.

[26] Sunderland, *A Modern Evolution in Remedial Rights—the Declaratory Judgment* (1917) 16 Michigan Law Rev. 69; Borchard, *The Declaratory Judgment—a Needed Procedural Reform* (1918) 28 Yale Law Jour. 1, 105.

[27] *Hanrahan* v. *Terminal Station Commission* (1912) 206 N. Y. 494, 100 N. E. 414.

[28] For a review of the decisions in England, Scotland, Canada, Australia, India and Germany, see 28 Yale Law Jour. 1, 16-29.

[29] The New Jersey Statute, Laws 1915, c. 116, § 7, p. 185 is as follows:

"Decree to Declare Rights. Subject to rules, any person claiming a right cognizable in a court of equity, under a deed, will, or other written instrument, may apply for the determination of any question of construction thereof, in so far as the same affects such a right, and for a declaration of the rights of the persons interested."

The courts have already stated that wills and contracts may be construed by declaratory judgments under the above statute and in two cases at least declaratory judgments construing contracts and declaring rights thereunder have been made by the New Jersey Court of Chancery. *Mayor of City of Bayonne* v. *East*

are in force, are the adjudication of property rights; the construction of contracts and statutes, and the decision of the validity or invalidity thereof; the determination of status such as legitimacy, marriage, lunacy and partnership relationship; and also the declaration of many miscellaneous rights and jural relationships, including the right to moneys and the existence of alleged duties or obligations.

Although this form of relief has been in force in England in its broadest scope only since 1883,[32] the large number of cases involving a declaration of rights either alone or as incidental to other relief, and the many reported English decisions on the subject indicate that the courts there have adopted very broad views and the remedy has proved to be an extremely valuable one. It is accordingly worth while comparing the language of the English and New York provisions on the subject to ascertain, if possible, what the probable action and interpretation of the New York courts will be.

The English provision is Order XXV, Rule 5, of the Rules of the Supreme Court and is as follows:

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

Almost identical language is used in the Michigan statute[33] and a

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Jersey Water Co. (N. J. 1919) 108 Atl. 121; *Renwick* v. *Hay* (1919) 90 N. J. E. 148, 106 Atl. 547; see also, *In re Ungaro's Will* (1917) 88 N. J. E. 25, 102 Atl. 244.

[30] The Connecticut Statute, 2 Genl. Stat. (1918) § 5113, is as follows:

"An action may be brought by any person claiming title to, or any interest in, real or personal property, or both, against any person who may claim to own the same, or any part thereof, or to have any estate in the same, either in fee, for years, for life, in reversion, or remainder, or to have any interest in the same, or any lien or incumbrance thereon, adverse to the plaintiff, or in whom the land records disclose any interest, lien, claim, or title conflicting with the plaintiff's claim, title or interest, and whether the plaintiff is entitled to the immediate or exclusive possession of such property, for the purpose of determining such adverse estate, interest, or claim, and to clear up all doubts and disputes, and to quiet and settle the title to the same."

There have been very few reported cases but the following statement in the first case of importance on the subject in Connecticut is significant:

"The legislation, however, is of a remedial character and must receive a liberal construction. For the purposes of this case we may assume that whether or not of limited application, it has a legitimate field of operation in its extended form." *Ackerman* v. *Union & New Haven Trust Co.* (1915) 90 Conn. 63, 73, 96 Atl. 149; see also *Foote* v. *Brown* (1905) 78 Conn. 369, 62 Atl. 667.

[31] There do not appear to be any reported decisions on the subject in Wisconsin and Florida, due no doubt to the fact that the statutes in both states were passed only in 1919, Wis. Laws 1919 c. 242, p. 253; Fla. Laws 1919 c. 7857 (No. 75), p. 148. The Florida act is not nearly so broad and general as the English and New York provisions. See note, *The Declaratory Judgment* (1920) 20 COLUMBIA LAW REV. 106.

[32] The Judicature Act of 1873 provided for the adoption of court rules, and by the Supreme Court Rules of 1883 Order XXV Rule 5 was created.

[33] The Statute is set forth verbatim as a foot-note to *Anway* v. *Grand Rapids Ry.* (Mich. 1920) 179 N. W. 350.

somewhat similar but more restricted provision is contained in the Florida act.[34]

The form of the New York provision is very different, however, and, while it appears to give the courts a discretionary right to entertain an application for a declaration of rights in almost any proper case, the words "in any action or proceeding" are distinctly ambiguous and provide a loophole of which it is feared the courts may take advantage, in view of the volume of such litigation which is to be expected. This clause may well be interpreted to mean that the Supreme Court shall have power to declare rights and other legal relations only as incidental to "any action or proceeding" already begun and in which some form of coercive judgment or decree is requested. Probably, it was intended that a declaration might be made in any action or proceeding, whether other relief is sought or not, and it is to be hoped that this broad and liberal construction will be adopted. Such an interpretation would seem to be required by the general provision: "This act shall be liberally construed".[35]

Perhaps the most serious question, however, relates to the constitutionality of the statute and the supplementary rules. There has already been a good deal of agitation by those opposed to any real reform in procedure, and by others as well, for the repeal of the provisions concerning declaratory judgments on the claim that they violate the constitution. Probably this question would not have been seriously raised were it not for the recent decision of the Supreme Court of Michigan in *Anway* v. *Grand Rapids Ry.*[36] where it was held by a divided court that an act similar to the one which has been in force in England for many years was unconstitutional on the ground that the making of a declaratory judgment was not a judicial function but rather the performance of a merely advisory function on the basis of moot or purely hypothetical questions.

It would be difficult to find a decision more reactionary and harmful in its effect and at the same time more clearly unsound in principle. By thus placing itself in the path of progress in the matter of procedural reform, the court has not only deprived the citizens of Michigan of a salutary and beneficial remedy already being judicially administered in many of the most enlightened countries of the world, but it has cast such doubt upon the validity of the law as undoubtedly to cause the legis-

[34] §1 of the Florida Statute, Laws 1919 c. 7857 (No. 75), p. 148, is as follows:
"That any person or corporation claiming to be interested under a deed, will, contract in writing, or other instrument in writing, may apply by Bill in Chancery to any Court in this State having Equity jurisdiction for the determination of any question of construction arising under the instrument and for a declaration of the rights of the person or corporation interested, whether or not further relief is or could be claimed, and said declaration shall have the force of a final decree in Chancery."

[35] C. P. A. §2.

[36] (Sept. 30, 1920) 179 N. W. 350. For a more extended discussion of this decision, see Note, *infra*, p. 168.

latures in many states to hesitate before adopting similar laws. The effect is already being felt in New York.

The basis of the decision seems palpably unsound,[37] and it is difficult to escape the conclusion that the court was unduly influenced by its fear that the labor "of advising 3,000,000 people" [38] as to their legal rights would overwhelm the courts. Nor is there the excuse that the point was not properly presented, as the flaws in the reasoning of the majority of the court are forcefully pointed out in the dissenting opinion of Sharpe, J., and briefs were filed by the Attorney General of the State and by Professor Edson R. Sunderland as *amici curiae.*

Neither the Michigan nor the New York statutes constitute the courts legal advisors of the public in any such general sense as contended by the Michigan court, nor has it ever been contended that a declaratory judgment might be made in moot cases involving no real controversy. The statutes contemplate the rendition of a judgment to be binding forever as *res adjudicata* just the same as any other judgment by any other judicial tribunal. If the case presented for a declaration of rights does involve merely a moot question and not a real controversy, the duty of the court is plain, and this is to dismiss the action or proceeding, as has been repeatedly done in those countries where declaratory judgments have been rendered for years.[39]

The most striking feature of the Michigan decision is that in so far as the case presented for decision was concerned, the result reached was correct. The bill of complaint alleged that the plaintiff was employed by the defendant street railway as a conductor; that he desired to work more than six days a week; and that he wished to have the court advise him whether he and the defendant would violate a certain statute if in the future they should enter into a contract providing that he should work more than six days a week. It also appeared that the defendant and the Amalgamated Association of Street and Electric Railway Employes of America, of which the plaintiff was not a member, had submitted the controversy to a Board of Arbitration, which had decided that a contract contemplating employment by the defendant for more than six days a week was invalid. The state was not made a party to the court proceeding. The real issue was thus between the parties and the state, or between the parties to the arbitration, not between the plaintiff and the defendant, and a decision on the merits would obviously not have been binding upon the state or its prosecuting officer when the question properly arose, nor upon the other party to the arbitration proceeding.[39a] The

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[37] See note, *Constitutionality of the Declaratory Judgment* (1920) 30 Yale Law Jour. 161.

[38] See *supra,* footnote 33, at p. 351 of the opinion.

[39] See *Guaranty Trust Co.* v. *Hannay* (K. B. 1915) 113 L. T. R. 98; see also *Austen* v. *Collins* (1886) 54 L. T. R. 903; *Faber* v. *Gosworth Urban D. C.* (1903) 88 L. T. R. 549.

[39a] As the Amalgamated Association had intervened before final decision it

court was hence, as suggested in the dissenting opinion,[40] amply justified in dismissing the bill without going out of its way to declare the whole statute unconstitutional by way of *dictum*. The result, as was to be anticipated, was that when a proper case was subsequently presented, involving a contest over the meaning of a written lease, in which all the parties were before the court, relief by way of a declaratory judgment was denied.[41]

While it is believed that the New York courts will not fall into the same error, there are two features of the situation here which give special ground for expecting the statute to be upheld. In the first place, Rule 212, quoted about,[41a] gives the court complete discretion to refuse declaratory relief where it does not regard the case as appropriate. This will take care of the many fictitious controversies which may be presented with a request for a declaration of the rights of the parties and in which advice and not adjudication is really sought. In the second place, there is a dictum by Cardozo, J., in a recent case in the Court of Appeals[42] which rather indicates a belief on his part that the provisions with respect to declaratory judgments are valid. Thus he says:[43]

"Much may be said in favor of introducing the declaratory judgment into our law of procedure (Borchard, The Declaratory Judgment, 28 Yale L. J. 1, 105). I think, however, we may assume that the lawmakers, if they had intended to introduce such a reform by the enactment of section 1836a of the Code, would have revealed their purpose more distinctly. They would have used language similar to that of the new Practice Act, which establishes a new remedy for the future (§473, ch. 925, Laws of 1920, adopted May 24, 1920, to take effect April 15, 1921). They would not have begun by authorizing a declaratory judgment which would not settle anything by its declaration, since it would be of no force in the only jurisdiction where there is an estate to be administered."

The above *dictum* cannot in any sense be regarded as a direct holding that the declaratory judgment provisions of the Civil Practice Act and Rules are valid and constitutional. Yet it shows that, although familiar with that well-known remedy, it had apparently never occurred to Judge Cardozo that the courts of other jurisdictions had been rendering advisory and non-judicial decisions and thus violating the fundamental law as expressed in the various State Constitutions. It is also significant in this connection that the courts of New Jersey and Connecticut in passing upon somewhat similar statutes have not even discussed the point which the Michigan Supreme Court went out of its way to decide.[44]

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would have been bound, but as the complaint was originally framed it was omitted as a party.

[40] See *supra*, footnote 33, at p. 366, for dissenting opinion of Sharp, J.

[41] (1920) 30 Yale Law Jour. 167.

[41a] see *supra*, p. 115.

[42] *Helme* v. *Buckelew* (1920) 229 N. Y. 363, 128 N. E. 216.

[43] See *supra*, footnote 42, at p. 372.

[44] *Mayor of City of Bayonne* v. *East Jersey Water Co.*, (N. J. 1919) 108 Atl.

There is accordingly every reason to believe that the declaratory judgment will be upheld by the New York courts and at the same time administered in such a manner as to prevent abuse by persons merely seeking advice or the adjudication of moot questions. It is hoped that by adopting a broad and liberal construction of Section 473 of the Civil Practice Act, the way may be paved toward a useful and active future for the declaratory judgment in New York.

Joinder of Parties

The new provisions with respect to the joinder of parties, which are set forth in full in the foot-note,[45] are taken largely, and almost *verbatim* in many instances, from the English practice[46] and the New Jersey Practice Act of 1912[47], so that the English and New Jersey decisions on the subject, which are usually inclined to a broad and liberal interpretation of the statutes and rules, may be expected to have considerable persuasive effect upon the New York courts.

Inasmuch as demurrers have been abolished, it may be assumed that all questions of nonjoinder or misjoinder of parties plaintiff or defendant will be raised by motions which may be made "at any stage of the cause" and the court is given broad discretionary powers to bring in new parties

121; *Renwick* v. *Hay* (1919) 90 N. J. E. 148, 106 Atl. 547; *In re Ungaro's Will* (1917) 88 N. J. E. 25, 102 Atl. 244; *Ackerman* v. *Union & New Haven Trust Co.* (1915) 90 Conn. 63, 96 Atl. 149; *Ackerman* v. *Union & New Haven Trust Co.* (1917) 91 Conn. 500, 100 Atl. 22. There is, however, a veiled reference in the second *Ackerman* case (91 Conn. 500, 505) to "the proper limits of the judicial field in its relation to the other co-ordinate branches of government." The court probably referred merely to a desire on its part to avoid judicial legislation in the matter of extending or creating new remedies.

[45] "§192. Nonjoinder and misjoinder. No action or special proceeeding shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added or substituted and parties misjoined may be dropped by order of the court at any stage of the cause as the ends of justice may require."

"§209. Joinder of plaintiffs generally. All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist whether jointly, severally or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled."

"§211. Joinder of defendants generally. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities."

"§212. Defendant need not be interested in all the relief claimed. It shall not be necessary that each defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest."

"§213. Where doubt exists as to who is liable. Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between the parties."

[46] Rules Sup. Ct., Order XVI rules 1, 4, 5, 7, 11.

or to drop those who have been improperly joined, or to direct separate trials "or make such other order as may be expedient". If these provisions of the new Act are liberally interpreted, and there is every reason to anticipate that the courts will liberally interpret them, it is difficult to imagine a case in which a decision on the merits shall be in any way delayed or affected by any defect or misjoinder of parties.

Furthermore, the innovations with reference to the joinder of parties *plaintiff* will undoubtedly have a very beneficial effect, as they will permit persons injured in a single accident or by any other single tortious act of another person or persons, now to sue together, thus avoiding multiplicity of actions with resulting delay and expense.

The old rule undoubtedly favored the defendant unduly as in many instances of persons injured by a single act, such as the negligent driving of an automobile, the plaintiffs were compelled to sue separately,[48] resulting sometimes in a verdict for the plaintiff in one case and for the defendant in the other, although the facts both as to negligence and contributory negligence were identical.

Nor are the provisions of the new Act with reference to the joinder of parties *defendant* less important and salutary, for they permit an action against an alleged principal and an alleged agent to be brought in the form of a single action[49], although it is apparent that only one of the two is liable, and a similar joinder in the case of many other legal relationships where the liability is alternative[50] and justice does not require that the plaintiff shall elect at his peril the person against whom he shall proceed, nor that he shall bring separate actions with the possibility of an adverse verdict in both.

Many of the provisions of the Code of Civil Procedure which relate to fundamental matters have very wisely, it is believed, been retained without change. Reference is made to the requirement that of the parties to the action, those who are united in interest, must be joined as plaintiffs or defendants,[51] the provisions with reference to representative actions and defenses for the benefit of others,[52] and the general equity provision

[47] §§4, 6, 8.

[48] *Lawrence* v. *McKelvey* (1903) 80 App. Div. 514, 81 N. Y. Supp. 129; *Havana City Railway Co.* v. *Ceballos* (1900) 49 App. Div. 263, 63 N. Y. Supp. 417.

[49] *Lage* v. *Weinstein* (N. Y. 1901) 35 Misc. 298; *Borell* v. *Newell* (N. Y. 1870) 3 Daly 233; *First Nat. Bank* v. *Turner* (1893) 24 N. Y. Supp. 793; *Tuthill* v. *Wilson* (1882) 90 N. Y. 423.

American Trading Co. v. *Wilson Sons & Co.* (N. Y. 1902) 37 Misc. 76, and similar cases merely hold that a complaint against both agent and alleged undisclosed principal is not demurrable. An election at the trial as to the one against whom the plaintiff desired to proceed would of course be required under the existing practice, but not under the new Civil Practice Act. *Cherrington* v. *Burchell* 1911) 147 App. Div. 16, 131 N. Y. Supp. 63.

[50] *Croaley* v. *Schwarzschild & Sulsberger Co.* (1910) 141 App. Div. 473, 126 N. Y. Supp. 301; *Automatic etc. Co.* v. *Twisted Wire etc. Co.* (1913) 159 App. Div. 656, 144 N. Y. Supp. 1037; *Hirsch* v. *New England Navigation Co.* (1909) 129 App. Div. 178, 113 N. Y. Supp. 395, reversed on another point in 200 N. Y. 263.

[51] C. P. A. §194, taken verbatim from Code Civ. Proc. §448.

[52] C. P. A. §195, taken verbatim from Code Civ. Proc. § 448.

permitting the court to determine a controversy where it can be done without prejudice to the rights of others or by saving their rights, but prohibiting such a decision where a complete determination of the controversy cannot be had without the presence of other parties.[53]

While the legislature may thus be considered to have accomplished a great deal in the way of reform and at the same time to have acted with sufficient conservatism to preserve that part of the Code of Civil Procedure on the subject which was probably essential, there appear to be one or two additional changes which might well have been made.

Since the language of §452 of the Code of Civil Procedure, relating to a motion to intervene to be made by a person not a party to the action is repeated *verbatim* in §193 of the Civil Practice Act, the courts will undoubtedly be compelled to adopt the construction of this language which has been repeatedly adopted by the Court of Appeals, to the effect that it was not intended to extend the right to intervene to actions for a sum of money only in which specific property was not involved.[54]

In view of the broad provisions to which reference has already been made relating to the joinder of plaintiffs and defendants, there would seem to be no valid objection to the inclusion of a further provision, making it possible for a person claiming an interest in the controversy or matter pending before the court, to make a motion for permission to intervene, and to give the court discretion in the granting or denying of such an application.

A typical case is one where A and B, real estate brokers, participate in bringing about a sale of property from X to Y. A claiming to be entitled to the whole commission for bringing about the sale, brings an action at law for damages against X. B either claiming to be entitled to the whole commission himself or to be entitled to a share thereof, desires to intervene and have his rights adjudicated at the same time as those of A and X. In such a case, as the law now stands, the court would not even have discretionary power to permit B to intervene [55] and he would be compelled to have his rights adjudicated in a separate action either against X or against A or both.

If the courts and the legislature are to make any really serious attempt to simplify procedure and expedite judicial business, there would seem to be no valid objection to permitting B to intervene in the case above stated. Of course, there is the well-worn argument which is always resorted to by the ultra-conservative, that to permit a third person to intervene in an action for a sum of money only might tend to confuse the issues, and make it difficult for a court and jury to render a proper decision. To this argument, there are two seemingly complete answers:

[53] C. P. A. § 193, repeated verbatim from Code Civ. Proc. §452.
[54] *Bauer* v. *Dewey* (1901) 166 N. Y. 402, 60 N. E. 30; *Chapman* v. *Forbes* (1890) 123 N. Y. 532, 26 N. E. 3.
[55] *Chapman* v. *Forbes, supra,* footnote 54.

(1) that the courts could and should be given a discretionary right to refuse to permit the intervention of a third person, where the issues would really be confused and the case thus be made a difficult one to try;[56] (2) the mere fact that the issues might become somewhat complicated is no adequate reason to deny a form of relief which would make justice more readily accessible and less expensive both to litigants and to the State. As stated as long ago as 1876 by Professor Pomeroy in the first edition of his pioneer work on *Code Remedies* at pages 492-3:[57]

"The only possible objection is the multiplication of issues to be decided in the one cause, and the confusion alleged to result therefrom. This objection is not real: it is the stock argument which was constantly urged in favor of retaining the common-law system of special pleading, and was repudiated when the codes were adopted by the American States, and has been at last utterly repudiated in England. Complicated issues of fact are daily tried by juries, and complicated equities are easily adjusted by courts."

The objection that the plaintiff should have the privilege of himself selecting the persons to be parties to his case is even less forceful as the speedy administration of justice with respect to the entire controversy is of infinitely greater importance than the whims or personal desires of a particular individual who happens to have initiated the litigation.

Nor may it be said that to embark upon such an innovation in New York would be to experiment in an untried field. There has been a similar provision permitting the intervention of third persons not parties to the action in the Codes of California and Iowa for over half a century,[58] and as appears by the reported cases in those jurisdictions and the others which have incorporated similar provisions in their Codes of Procedure, the provision has worked very well indeed.[59]

There is another step which the New York legislature might well have taken, one which appears so plainly desirable that it is difficult to understand why the change has not been made. Section 454 of the Code of Civil Procedure makes it possible to sue in the same action, persons severally liable upon the same written instrument, including a promissory note and bill of exchange, and this provision has been incorporated verbatim in the Civil Practice Act. The courts have interpreted this section, and very properly, so as to exclude the possibility of suing in the same action, persons liable as guarantors, even though the obligation of such guarantors is evidenced by a writing on the same piece of paper as that upon which other persons are severally liable within the meaning of

[56] Compare the similar provision now part of C. P. A. §209, *supra,* footnote 45.

[57] This statement appears also in the Fourth Edition (1904) at page 428.

[58] California Code of Civil Procedure §387, which appeared in substantially the same form in the original Practice Act §§659-61 (Statutes 1854, Redding ed. p. 73, Kerr ed. p. 102 §§71-3. Iowa, Civil Code §3594, which found its origin in Revised Laws of 1860 §2930 and Iowa Civil Code of 1873 §2683.

[59] See full discussion with citation of many authorities in Pomeroy, *Code Remedies* (4th ed.) pp. 420-6.

Section 454. In other words, if a person writes on the back of a promissory note "I hereby guarantee the payment of the within note" and adds his signature, he is not "liable on the same written instrument" as his obligation is not that of an endorser but that of a guarantor liable upon a separate instrument, even though written on the same piece of paper.[60] Similarly, a person who executes at the bottom of a lease his guarantee of the performance by the tenant of all the covenants on his part to be performed, is not liable upon the same written instrument as the tenant.[61]

Rule 7 of the New Jersey Practice Act covers this point very neatly by adding: "also endorsers, guarantors, and sureties, whether on the same or by a separate instrument, may all, or any of them, be joined as debendants."[62]

The only objection which it is believed has been raised in New York on this point is the same old contention that the issues would be confused and the jury called upon to pass on such a variety of different points as to make for possible injustice.

If the legislature has finally disposed of this bugbear in reference to the general joinder of causes of action and parties plaintiff, there is no reason in justice and common sense why it cannot also be disposed of as to persons not originally made parties to the action. The general provisions, now contained in Civil Practice Act, §209, that separate trials may be ordered where it appears that a joinder of parties will cause embarrassment or delay, would appear to give complete protection against injustice in any case.

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[60] *Harris* v. *Eldridge* (N. Y. 1879) 5 Abb. N. C. 278, 280.

[61] *Roehr* v. *Liebmann* (1896) 9 App. Div. 247, 249, 41 N. Y. Supp. 489; see *Straus* v. *Hoadley* (1897) 23 App. Div. 350, 48 N. Y. Supp. 239; *Isear* v. *Daynes* (1896) 11 App. Div. 557, 37 N. Y. Supp. 474.

[62] See *supra*, footnote 47.